82-1589

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1982

JAMES EDWIN CARPER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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JAMES EDWIN CARPER,

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v.

UNITED STATES OF AMERICA,

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ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

MAY IT PLEASE THE COURT:

QUESTIONS PRESENTED

I

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION BY NOT EXCLUDING LIMITLESS TESTIMONY AS TO UNRELATED CRIMINAL ALLEGATIONS WHICH WAS UNFAIRLY PREJUDICIAL TO THE DEFENDANT PURSUANT TO RULE 403 OF THE FEDERAL RULES OF EVIDENCE.

II

WAS THE DEFENDANT, DUE TO THE IMPROPER ADMISSION OF TESTIMONY CONCERNING CRIMES NOT CHARGED, EFFECTIVELY DENIED HIS RIGHT TO TESTIFY ON HIS OWN BEHALF IN VIOLATION OF BOTH AMENDMENTS V AND VI TO THE UNITED STATES CONSTITUTION.

III

DID THE TRIAL COURT ERR IN DENYING APPELLANT'S MOTION TO SUPPRESS EVIDENCE OBTAINED AS A RESULT OF A SEARCH WARRANT SUPPORTED BY AN INSUFFICIENT AFFIDAVIT.

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OPINION BELOW

This case has not been reported by the Courts below. The opinion of the United States Court of Appeals for the Sixth Circuit, styled "ORDER" and filed by that Court on December 9, 1982, is appended to this Petition. Case #81-5655. A Petition for Rehearing En Banc was filed and subsequently denied on January 24, 1983. A copy of the denial is appended to this Petition.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit is set out in the Appendix hereto. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant constitutional and statutory provisions are set out below:

AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have

been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have assistance of counsel for his defense.

TITLE 18 U.S.C. §2

Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

TITLE 21 U.S.C. §841(a)(1)

§841. Prohibited acts A - Penalties

(a) Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally--

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or...

TITLE 21 U.S.C. §846

Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this title is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

TITLE 18 U.S.C. §924(c)

Penalties

(c) Whoever -

(1) uses a firearm to commit any felony for which he may be prosecuted in a court of the United States, or

(2) carries a firearm unlawfully during the commission of any felony for which he may be prosecuted in a court of the United States,

shall, in addition to the punishment provided for the commission of such felony, be sentenced to a term of imprisonment for not less than one year nor more than ten years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to a term of imprisonment for not less than two nor more than twenty-five years and, notwithstanding any other provision of law,

the court shall not suspend the sentence in the case of a second or subsequent conviction of such person or give him a probationary sentence, nor shall the term of imprisonment imposed under this subsection run concurrently with any term of imprisonment imposed for the commission of such felony.

FEDERAL RULES OF EVIDENCE 403

Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

FEDERAL RULES OF EVIDENCE 404(b)

Other Crimes, Wrongs, or Acts

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

STATEMENT OF THE CASE

On December 10, 1980, the Grand Jury for the Western District of Tennessee returned a Sixteen-Count indictment against James Edwin Carper. Count One charged him with a conspiracy to distribute a controlled substance, with Counts Two through Twelve charging that Mr. Carper did unlawfully, knowingly and intentionally possess with intent to distribute controlled substances in violation of Title 21, United States Code, Section 841(a)(1), and Title 18, United States Code, Section 2. Count Thirteen charged a violation of Title 21, United States Code, Section 841(a)(1) only. Counts Fourteen through Sixteen charged that Carper violated Title 18, U.S.C., Section 924(c), by carrying a firearm during his commission of the offense of possession of controlled substances with the intent to distribute.

Trial on these matters commenced in the United States District Court for the Western District of Tennessee on May 26, 1981. After a rather lengthy trial, replete with what Defendant's counsel submits was improper prejudicial testimony, Carper was found guilty on all the Sixteen Counts.

August 21, 1981, James Edwin Carper was sentenced to TEN (10) YEARS as to each of Counts One through Thirteen, concurrently, with THREE (3) YEARS Special Parole as to each of Counts Two through Thirteen, concurrently. ONE (1) YEAR as to each of Counts Fourteen, Fifteen, and Sixteen, concurrently, but consecutively with sentence imposed in other counts, for a TOTAL SENTENCE of ELEVEN (11) YEARS with THREE (3) YEARS Special Parole to follow.

Defendant Carper, a first offender, was taken into custody and his bond re-

voked. Subsequently he filed Notice of Appeal on August 27, 1981. The United States Court of Appeals for the Sixth Circuit affirmed the District Court ruling by Order dated December 9, 1982. A Petition for Rehearing was filed with the Sixth Circuit December 22, 1982, but was denied by Order of the Court January 24, 1983.

Original jurisdiction in the United States District Court was predicated upon an alleged violation by Petitioner of Title 21 U.S.C. §§841(a)(1), 846, and Title 18 U.S.C.§§2, 924(c).

ARGUMENT

I. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION BY NOT EXCLUDING TESTIMONY AS TO UNRELATED CRIMINAL ALLEGATIONS WHICH WAS UNFAIRLY PREJUDICIAL TO THE DEFENDANT PURSUANT TO RULE 403 OF THE FEDERAL RULES OF EVIDENCE.

In the beginning, Defendant sought to require the Government to state what proof

of like and similar conduct or other crimes they sought to introduce to prove the charges against him; at the same time, a motion was filed to restrict the Government to relevant and proper proof as to the charges levied against him in the indictment. These motions, set out below, were summarily overruled, albeit perfunctorily.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

VS. CR. NO. 80-20157

JAMES EDWIN CARPER,

Defendant.

MOTION TO REQUIRE PRE-TRIAL FURNISHING OF ALL LIKE OR SIMILAR ACTS WHICH THE GOVERNMENT MAY SEEK TO PROVE

TO THE HONORABLE ROBERT M. McRAE, JR., JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE, WESTERN DIVISION:

Defendant respectfully prays that this

Honorable Court require the Government, pre-trial, to furnish to counsel, in detail, by document, recording, etc., all information relative to any "like or similar offenses", which the Government may seek to prove in order to establish some necessary or material element in the instant prosecution.

Defendant respectfully submits that he is entitled to notice of those charges which he must answer, and which the Government would seek to prove, either as one of the exceptions under Rule 404(b), or for any other purpose, in order that they may properly be defended against.

AUTHORITY RELIED ON

U.S. v. Jones, 570 F.2d 765 (C.A. 8 1978)

Federal Rules of Evidence, Rules 403 and 404

Respectfully submitted,

/s/
JAY FRED FRIEDMAN
Attorney for Defendant
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Memphis, Tennessee 38103
901/527-6518

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

VS. CR. NO. 80-20157-M

JAMES EDWIN CARPER, et al.,

Defendant.

MOTION IN LIMINE

TO THE HONORABLE ROBERT M. McRAE, JR., JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE, WESTERN DIVISION:

COMES NOW Defendant, through counsel, who would respectfully move the Court to limit the government in its proof, to exclude any alleged transactions between parties who are neither named in the indictment, nor are named as co-conspirators.

Defendant respectfully submits, first, that they are neither relevant, second, that they are beyond the scope of the conspiracy as charged, and third, that certain of these transactions are as between persons, all of whom were working for law enforcement, and fourth, that if the Court will require a structuring of the proof, requiring proof by the government of the existence of a conspiracy, and the parties and acts referred to in their letter of May 20 as being a part thereof, then counsel will have no problem, since he respectfully submits that such a showing, in truth and fact, cannot be made.

WHEREFORE, counsel for Defendant respectfully prays that this Honorable Court review and determine, pre-trial, the

admissibility of any such alleged sales to persons not named in the indictment as being involved in the conspiracy. That upon review, the Court find and hold that the government may not seek to introduce extraneous and unrelated transactions as proof in this cause.

Respectfully submitted,

/s/
JAY FRED FRIEDMAN
Attorney for Defendant
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Memphis, Tennessee 38103
901/527-6518

AUTHORITY RELIED ON

Rule 12.1, Federal Rules of Criminal Procedure

The voluminous testimony subsequently admitted pursuant to the Judge's ruling on the above motions fell into the category of unfair prejudice, confusion of the issues, and misleading the jury. Relevant testimony, directly applicable to the transgressions enumerated in the indictment, was elicited from only a very few chief witnesses. Unfortunately, fourteen addi-

tional witnesses were paraded before the jury testifying to a number of alleged crimes by Defendant, to-wit: sales of drugs to them--all testimony as to which was sought to be limited, excluded, or at least disclosed pre-trial. Even were such testimony adjudged relevant, it would be excludable as not only more prejudicial than probative, but also "needless presentation of cumulative evidence". Rule 403.

After an initial futile attempt to object to this line of impermissibly prejudicial questioning, counsel and Defendant were forced to stand by helplessly as Mark Bagwell, Ted Brown, George Childers, M.H. Thomas, Patrick Colston, Philip Baker, Pam Bruner, Ann Hutchins, Mary Pinkston, Bryan Howard, Betty Sancucci, Ronald Robertson, Douglas Hutchins and Donna Helms testified to numerous alleged crimes--none with which Defendant Carper had been charged or was

prepared to defend against.

In addition, the prosecution saw fit to elicit from these witnesses the fact that Mr. Carper kept a rather thorough gun collection locked in a special room in his home, and would, on occasion, engage in target practice. These are true facts, but simply another attempt by the government to prove their case by innuendo.

The government seemed intent through all these means to call into question the character of Edwin Carper--an issue not properly in dispute.

> "It is well settled law that in a criminal case, the defendant's general character cannot be attacked by the Government unless evidence as to his good character is first introduced by the defendant."
>
> United States v. Walker, 313 F.2d 236, 238 (6th Cir. 1963)

Indeed, as will be discussed later, Defendant Carper was to never even take the witness stand.

Testimony of this sort encompasses the bulk of the trial, with another good bit of tainted testimony by members of the "Organized Crime Strike Force" as to items seized illegally.

> "If evidence is admitted that is of little probative value but that is highly prejudicial to a defendant, there is a denial of due process of law and he is entitled to a new trial."
>
> U.S. ex rel. Springle v. Follette, C.A. 2d 1970, 435 F.2d 1380, 1382.

Even if the objectionable testimony were deemed probative, such would not insure the propriety of its admission.

> "So also, if certain evidential material, having legitimate probative value, tends nevertheless to produce also, over and above its legitimate effect, an unfair prejudice to the opponent****there is good ground for excluding such evidence, unless it is indispensable for its legitimate purpose."
>
> 6 Wigmore, Evidence, 3d ed. 1940, §1865, p. 491.

See also U.S. v. Chapin, 515 F.2d 1274, 1284 (1975), and U.S. v. Cockerham, 476

F.2d 542, 545 (1973).

Defendant submits that all but two of the Counts were supported almost exclusively by the testimony of co-defendants and co-conspirators. There is certainly a reasonable belief that a jury confronted with nothing but the unsupported testimony of co-defendants and co-conspirators, who are seeking leniency or help from the Government in exchange for their testimony, might well reject such. Neither of the co-defendants/co-conspirators were credible or impressive witnesses, and a jury likely would have reached a different conclusion on some and possibly all Counts.

Based upon the extraneous and improper evidence admitted in this case, it is easy to see how a jury was prejudiced against the Defendant. In addition, it is obvious that even an objective panel of gentlemen learned in the law, such as the

panel on the United States Court of Appeals for the Sixth Circuit, were likewise prejudiced against the Defendant by the inadmissible and extraneous evidence. Needless to say, the trial judge obviously was because of the extreme severity and unprecedented sentence given Defendant in this cause.

A jury, when confronted with all the unnecessary and improper evidence of other alleged misconduct, as well as the trial court and the learned judges of the Sixth Circuit, was unduly prejudiced and impassioned against the Defendant, not for the crime he allegedly committed, but because of other improper acts attributed to him for which he was not on trial. Such basic unfairness constitutes an obvious denial of due process of law, and should mandate a new trial.

II. WAS THE DEFENDANT, DUE TO THE IMPROPER ADMISSION OF TESTIMONY CONCERNING CRIMES NOT CHARGED, EFFECTIVELY DENIED HIS RIGHT TO TESTIFY ON HIS OWN BEHALF IN VIOLATION OF BOTH AMENDMENTS V AND VI TO THE UNITED STATES CONSTITUTION.

Defendant would show to this Honorable Court that, as a result of the heretofore cited and established improper evidentiary rulings by the learned trial judge, he was placed on the horns of a dilemma. Should he take the stand and answer the charges against him found in the indictment, or should he avoid the witness stand in order to not be forced to testify about or answer the myriad of collateral allegations that the Court had allowed to creep in? Any attempt by Carper of setting the record straight and showing the jury that his was a simple case of entrapment would have allowed the Government upon cross-examination to quiz him concerning

these unrelated and, we assert, irrelevant instances of supposed criminal conduct. Just as defendants in our system of justice are guaranteed the right to confront witnesses against them, so are they necessarily allowed to testify on their own behalf. This right originates in both the Confrontation Clause of the Sixth Amendment to the Constitution as well as the Due Process Clause of the Fifth Amendment. Through improper evidentiary rulings and subsequent prosecutorial persistence, the Government circumvented this constitutional guarantee and effectively prevented Edwin Carper from testifying on his own behalf. U.S. ex rel. Springle v. Follette, supra, at 1382.

Defendant, through counsel, asserts that relief is imperative due to the Sixth Circuit Court's sanction of the trial court's radical departure from the ac-

cepted and usual course of judicial proceedings. [Supreme Court Rules, Rule 17.1(a)].

III. DID THE TRIAL COURT ERR IN DENYING APPELLANT'S MOTION TO SUPPRESS EVIDENCE OBTAINED AS A RESULT OF A SEARCH WARRANT SUPPORTED BY AN INSUFFICIENT AFFIDAVIT.

Petitioner-Appellant respectfully submits that the trial court erred by denying his Motion to Suppress Evidence seized at 6584 East Brook Lane, Apartment #1, Memphis, Tennessee. By subjecting the affidavit supporting the search warrant to the standards set forth by this Honorable Court in Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978), the false statements made by the affiant, once stricken from the affidavit would render the affidavit completely void for lack of probable cause and would demand the suppression of the fruits of the illegal

search.

Petitioner complied with Federal Rules of Criminal Procedure 12 and 41 when he filed a Motion to Suppress prior to trial. The allegation of false statement made by the affiant could not have been raised prior to trial because it was not discovered until late into the trial (T. 1216-1217). Calling the Court's attention to the testimony of Officer Chism from his report (T. 1131-1136) and the testimony of Officer Bierbrodt (T. 34-39), it became absolutely clear that Defendant Carper was never seen going into that particular apartment, even though it was sworn to under oath by the affiant that he was seen. Defense counsel sought to get a proper ruling from the Court by renewing his suppression motion (T. 1296-1307), which was summarily dismissed and ridiculed by the Court. Counsel brought to the trial

court's attention the applicable portion of this Honorable Court's holding in Franks v. Delaware, supra, wherein it was stated that:

> "Where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally or with reckless disregard for the truth was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit."
>
> 98 S.Ct. at 2676-77.

Not only was there no evidentiary hearing, there really was no need for one. The Court could see and the record is absolutely one hundred percent crystal clear,

the officers lied [emphasis supplied by counsel] in order to get a warrant to search the apartment. While it was true he went to the parking lot and met another vehicle, it is likewise absolutely true that no one saw him enter or leave that apartment and return to make the delivery of the cocaine. Ergo, no present probable cause then existed. The search warrant was improvidently issued, based upon false or reckless statements made by the affiant. Any other conclusion flies in the face of the truth and the record.

The admission of the evidence seized from that apartment was peculiarly prejudicial in that it represented a sizeable quantity of cut with a minute amount of cocaine mixed in. While the record is unclear, the factual inference to be drawn therefrom was that a small quantity of cocaine with a large amount of cut was

discovered in that apartment, and the two mixed in order to have a test run on the entire mixture so that it would reveal the presence of some cocaine. It is certainly impressive to have multiple pounds of cut with a gram or two of cocaine mixed in to be introduced as evidence against a defendant in order to make it appear that there was more involved than in truth and fact existed. Defendant was severely prejudiced by this, and was in fact convicted of a substantive count based thereon, and, needless to say, substantially prejudiced in his attempt to present a factual and truthful defense.

In the instant case, a common sense and realistic reading of the affidavit would not lead a reasonable person to believe that evidence of criminal activity would be found at the apartment. If such were the case, under the scant information

presented in this affidavit, police would have unlimited authority to search any residence which a person suspected of criminal behavior had chosen to visit regardless of the circumstances surrounding the visit. The rule remains that mere affirmance of belief or suspicion is not enough to establish probable cause. Nathanson v. United States, 290 U.S. 111.

Accordingly, the Appellant respectfully submits the proper ruling to make should be that there was too little information upon which to base a finding of probable cause to search the apartment in question, since there was not a nexus established between the alleged criminal activity and the place to be searched nor an independent showing of probable cause. Consequently, Appellant respectfully submits that the evidence obtained as a result of this search should have been sup-

pressed and, therefore, the District Court's decision should now be reversed.

The Petitioner would also wish to direct this Honorable Court's attention to the opinion of the United States Court of Appeals for the Sixth Circuit, filed December 9, 1982, in which the three-judge panel tacitly agreed with the position maintained by the Petitioner on the validity of the search warrant. Looking at pages 2-3 of the order, the Sixth Circuit stated:

> "Here Carper first claims that the trial court erred in not suppressing evidence obtained pursuant to a search warrant which, Carper alleges, was not supported by a sufficient affidavit. We decline to reach the question. Assuming, arguendo, that the warrant was defective and that, therefore, the evidence as to counts 12 and 13 should be excluded, we find the evidence otherwise so overwhelming as to each of the remaining fourteen counts that reversal of counts 12 and 13 would have no effect on Carper's sentence."

Viewing this statement in a light

most reasonable to the allegations complained of throughout the course of this cause, it can only be justly inferred that the Sixth Circuit agreed that the affidavit to search warrant question on this appeal was in fact defective and completely lacking of probable cause. Thus, the fruits of this illegal search should have been suppressed by the trial court, which erred by not doing just that which is complained of in this cause.

Petitioner submits that the nature and scope of the error involved are clearly of constitutional dimensions. That, as a result of the improper rulings by the trial judge on evidentiary matters, and the admission of extraneous and unrelated criminal activity, with which Defendant was not charged in the indictment, he was severely prejudiced. In addition, the bulk of the testimony which was so highly

prejudicial to Defendant consisted of unrelated and uncharged crimes, and was predicated on testimony which was obviously far more prejudicial than probative. That testimony could not and should not have fairly or reasonably been admitted. Coupling this with the incorrect ruling by the trial judge on the evidence suppression question, it would be virtually impossible to deny that the Defendant was severely and improperly prejudiced by these things. Had Defendant been confronted only with relevant and proper evidence on charges contained in the indictment, he certainly would have been better able to defend himself, and likely testify in his own behalf. The extent and degree of the prejudice are clearly reflected both by the unwarranted and unprecedented sentence imposed on Defendant in this case. Further reinforcing that is the finding of the United States

Court of Appeals for the Sixth Circuit, who were likewise prejudiced by all of the extraneous and improper matter which was allowed to go into the record, which merely served to prejudice Defendant, and added nothing to the charges contained in the indictment. Petitioner submits that, if granted a new trial with proper evidentiary rulings, there is a substantial, almost absolute, assurance that the verdict on most of the Counts, and possibly all, would be materially different. Petitioner submits that, even should he be convicted on any of the Counts on a retrial, the sentence would have to be materially and substantially less. Petitioner is a first offender and received a harsher and more severe sentence than has ever been inflicted on any multiple drug offender in this jurisdiction, to counsel's knowledge.

The Petitioner respectfully asks that

this Honorable Court remedy the violation of the rights provided him by the Fourth Amendment to the Constitution of the United States.

CONCLUSION

Petitioner respectfully prays that this Honorable Court take jurisdiction of this matter and, upon consideration of the merits of this Petition, reverse the judgments of the lower courts, with directions, and grant Defendant the fair trial which he failed to receive below.

Respectfully submitted,

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APPENDIX

No. 81-5655

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v. O R D E R

JAMES EDWIN CARPER,

Defendant-Appellant

Before: LIVELY and MARTIN, Circuit Judges; and BROWN, Senior Circuit Judge.

James E. Carper appeals jury convictions on one count of conspiring to distribute controlled substances (21 U.S.C. § 846) for which he received a sentence of ten years; twelve counts of aiding and abetting in possession with intent to distribute controlled substances (21 U.S.C. § 841, 18 U.S.C. § 12) for which he received

sentences of ten years on each count to run concurrently with the sentence imposed for the first count and three years probation on each of the twelve counts to run concurrently; and three counts of unlawfully carrying a firearm during the commission of a felony (18 U.S.C. § 924(c)) for which he received sentences of one year on each count to run concurrently with each other but consecutively with the sentence imposed in other counts. His sentence totalled eleven years with three years parole to follow. We affirm.

Carper's arrest followed six months of undercover work by the Organized Crime Strike Force of the Memphis Police Department. During that time, undercover agents employed by the police and equipped with wireless audio transmitters made controlled purchases of narcotics from various drug dealers in the Memphis area. On a number

of occasions, the purchases were recorded on videotape. Audio and video recordings reveal at least six occasions on which purchases were made from Carper, either indirectly as a supplier who accompanied the dealer or directly as a dealer.

Carper was arrested with his girlfriend while waiting to make a pre-arranged sale to an undercover agent. In his possession were two pistols and quantities of cocaine and quaaludes. A search of his and his girlfriend's apartments uncovered a variety of drug-related paraphenalia, quantities of cocaine and quaaludes, and $6,000 in cash.

Here Carper first claims that the trial court erred in not suppressing evidence obtained pursuant to a search warrant which, Carper alleges, was not supported by a sufficient affidavit. We decline to reach the question. Assuming,

arguendo, that the warrant was defective and that, therefore, the evidence as to counts 12 and 13 should be excluded, we find the evidence otherwise so overwhelming as to each of the remaining fourteen counts that reversal of counts 12 and 13 would have no effect on Carper's sentence. Barnes v. United States, 412 U.S. 837 (1973). Accord, United States v. Grunfeld, 558 F.2d 1231 (6th Cir. 1977).

Secondly, Carper asserts that governmental conduct was so outrageous that due process precludes prosecution. We disagree and find easily distinguishable those cases cited by Carper in which government actions were found to be so fundamentally unfair as to justify dismissal. Without exception, the cases cited by Carper involved situations in which government agents, by supplying defendants with the material necessary to initiate and consummate the crime,

planted "the seeds of criminality" and "lure[d]" the defendant into a conspiracy." United States v. Twigg, 588 F.2d 373, 380 (3d Cir. 1978). That is not the case here. This case involves the use of paid informants to infiltrate existing criminal enterprises, a practice we acknowledged in United States v. Brown, 635 F.2d 1207 (6th Cir. 1980) as a "recognized and permissible means of investigation." Id. at 1212. At most, the government provided funds for the purchase of drugs already in the possession of, and willingly supplied by, Carper.

Carper next raises the issue of judicial misconduct. He complains that a demonstrated antagonism and hostility toward defense counsel by the trial judge denied him a fair trial. He points specifically to eleven separate instances of alleged misconduct. Examination of the

transcript reveals that nine of the eleven occurred outside the presence of the jury and could not have affected its verdict. As to the remaining two, we find them mildly objectionable but not so prejudicial in the context of the entire trial as to influence the outcome. Nor can we find anything in the court's treatment of Cyko which even remotely prejudiced Carper's interests or his right to a fair trial.

In his remaining two arguments, Carper asserts that neither the court's revocation of bond following conviction nor its imposition of sentence was proper. Again, we disagree. The setting and revocation of bail is a matter clearly within the discretion of the trial judge. We see no abuse of that discretion on the record before us. There was more than sufficient credible evidence before the court of Carper's threats, use of firearms, violent charac-

ter, and intent to flee to support revocation.

Sentencing, like the setting of bail, is a discretionary matter within the purview of the court. United States v. Woods, 544 F.2d 242, 269 (6th Cir. 1976). That we might find an imposed sentence harsh is not grounds for interference on our part. United States v. Thompson, 612 F.2d 233, 234 (6th Cir. 1980). In this case, Carper's sentence is considerably more lenient than that which the court might have imposed given the legally permissable range set by the legislature. We will not disturb it.

Affirmed.

ENTERED BY ORDER OF THE COURT

/s/
Clerk

ISSUED AS MANDATE: FEBRUARY 1, 1983
COSTS: NONE

*This order was prepared by Judge Martin.

No. 81-5655

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v. O R D E R

JAMES EDWIN CARPER,

Defendant-Appellant

Before: LIVELY and MARTIN, Circuit Judges; and Brown, Senior Circuit Judge.

On receipt and consideration of a petition for rehearing and suggestion for rehearing en banc in the above styled case; and

No judge in active service in this Court having moved for rehearing en banc and the motion therefore having been referred to the panel which heard the case; and

The panel having noted nothing of sub-

stance in said motion for rehearing which had not been carefully considered before issuance of the court's opinion,

Now, therefore, the motion for rehearing is hereby denied.

ENTERED BY ORDER OF THE COURT

/s/ _____
Clerk

CERTIFICATE OF SERVICE

I, JAY FRED FRIEDMAN, hereby certify that three copies of the foregoing have been served upon the Solicitor General, Department of Justice, Washington, D.C., 20530, and upon Mr. Hickman Ewing, United States Attorney, 10th Floor, Federal Building, 167 North Main, Memphis, Tennessee, 38103, by U.S. Mail, first class postage prepaid, this the 25th day of March, 1983.

JAY FRED FRIEDMAN